Nos. 21957, 22404

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Appellant,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFI and EUGENE C. JONES,

Appellees.

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Appellant,

vs.

TITLE INSURANCE & TRUST COMPANY,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

This brief is in reply to the brief filed by the Webb group (No. 21957), and to the brief filed by the Title Insurance & Trust Company (No. 22404).

Reply to Brief Filed by Webb Group.

1. Reply to Summary of Argument. (Webb Brief, pp. 9-11).

At pages 9-11 of the Webb brief, in the Summary of Argument, Webb says that the Association claims ancillary jurisdiction by reason of the remaining controversy between the Association and the Board, but that the trial court found that this remaining contro-

versy is not sufficient to be a basis for jurisdiction, and the court's finding is not questioned in the Association's opening brief.

The Association's opening brief did not make that argument. The arguments made in the Association's opening brief are: (a) that the court has original jurisdiction of the Association's claim against Webb under 12 U.S.C.A. 1464(d)(1) because the Board was authorized to and did give statutory notice of Webb's violation, and 12 U.S.C.A. 1464(d)(1) authorizes either the Board or the Association to bring suit to enforce the Board's notice; and (b) that in any event the court has original jurisdiction of the Board's suit against Webb under 28 U.S.C.A. 1345 and ancillary jurisdiction of the Association's related or identical claim against Webb as a cross-claim.

In addition, the Association hereby adopts the argument suggested by Webb that there is ancillary jurisdiction of the Association's claim against Webb because of the remaining controversy between the Board and the Association. The Association does not concede the correctness of the trial court's ruling that this remaining controversy is not sufficient to support jurisdiction under 12 U.S.C.A. 1464(d)(1). The second amended and supplemental complaint alleges in general terms that a controversy exists between the Board and the Association. The trial court took evidence to determine the nature and the extent of that controversy. The result was determined to be that the Board contends, and the Association denies, that the Webb group is liable for punitive damages, and that the Association should be precluded from re-employing anyone from the Webb group. The court did not

conclude that there is no controversy. The existence of the controversy is admitted. The court's conclusion that the controversy is insufficient is erroneous. The statute does not authorize the district courts to accept or decline jurisdiction based on their views of whether controversies are sufficiently important to be adjudicated. The statute provides that the district courts are to take jurisdiction of all suits brought by the Board or an association to adjudicate controversies raised by the Board's notices of violation of law.

We believe that the correct construction of the statute is that it is not limited to controversies between the Board and the Association, as such, but that it extends to adjudicating all claims raised by the Board's statutory notice of violation, vis-a-vis the real parties in interest. But if jurisdiction must depend on the existence of a controversy between the Board and the Association, such controversy does exist in this case.

2. Reply to Argument I. (Webb Brief, p. 12).

The first argument made in the Webb brief is that the Association's claim against Webb does not involve a federal question. The existence of a federal question is pleaded in the second amended and supplemental complaint, but was not argued in the Association's opening brief. Since writing that brief we have read *Murphy v. Colonial Federal Savings and Loan Association* (2nd Cir. 1967) 388 F. 2d 609, which indicates that jurisdiction may be based on 28 U.S.C.A. 1331 (federal question) and also on 28 U.S.C.A. 1337 (regulation of commerce). In the *Murphy* case shareholder-depositors of a federal savings and loan association brought suit against the association for declaratory re-

lief with respect to the association's refusal to furnish them with a list of persons eligible to vote for the directors of the association. The District Court stayed proceedings pending application to the Federal Home Loan Bank Board under 12 U.S.C.A. 1464. The Board denied the application. The District Court then granted the plaintiffs' motion for summary judgment, holding that the election of directors was unfair because there was a denial of the plaintiffs' right to be informed of the electorate. On appeal the question was whether the District Court had jurisdiction, and the judgment was affirmed. The Court of Appeals held that there was a federal question because the rights of shareholders of a federal savings and loan association is a matter of federal common law and is not dependent on the laws of the states. The court said:

> "This would become readily apparent if the common law of the state where the association operated denied members a right of inspection; Congress could hardly have intended that the rights of members of Federal Savings and Loan Associations to fair elections should vary with quirks of local law." (388 F. 2d at 611.)

In the *Murphy* case there was nevertheless a further obstacle to basing jurisdiction on a federal question because, by the nature of the claim, the $10,000 jurisdictional amount was not necessarily present. In our case, this is, of course, not an obstacle as the amount in controversy is $1,800,000.00. The Murphy court, however, did not remand to determine the amount in controversy. It was held that jurisdiction could be founded alternatively on 28 U.S.C.A. 1337, which authorizes suits arising "under any Act of Congress reg-

ulating commerce" without regard to the amount in controversy. The court held that, although federal regulation of finance is not grounded on the commerce power alone, the commerce clause is still a significant source for such regulation.

3. Reply to Argument II. (Webb Brief, pp. 12-13).

The second argument made in the Webb brief is that there is no pendent jurisdiction. As we understand it, pendent jurisdiction is when there are two claims, one federal and one non-federal, which constitute the same cause of action. The court then has pendent jurisdiction of the non-federal claim. The Association does not claim, and hence has not argued, that there is pendent jurisdiction in this case.

4. Reply to Argument III. (Webb Brief, pp. 13-17).

The third argument made in the Webb brief is entitled, "The Doctrine of Ancillary Jurisdiction Does Not Apply," but seems to encompass both: (a) the argument made in the Webb Summary of Argument that there is no longer any substantial controversy between the Board and the Association and hence no ancillary jurisdiction over the Association's claim against Webb; and also (b) a reply to the argument made in the Association's opening brief that the court has original jurisdiction over the Association's claim against Webb under 12 U.S.C.A. 1464(d)(1).

As to ancillary jurisdiction, it is stated at page 16 of the Webb brief that, "If there existed a valid substantial dispute between the Association and the Bank Board, there might be some validity in an assertion that either the Association or the Bank Board could

join other parties necessary for a complete determination of the dispute or a complete and effective granting of relief." This concession is made by Webb on the assumption that the trial court was authorized to decline jurisdiction over the remaining controversy between the Board and the Association on the theory that it is not sufficiently substantial.

As noted earlier in this reply brief, the Association agrees with Webb and accepts Webb's suggestion that the Association's claim against Webb is ancillary to the remaining controversy between the Board and the Association. The further assumption, however, that the court could refuse jurisdiction over the remaining controversy is disputed. The statute clearly does not give the court the discretion to adjudicate some controversies and to refuse to hear others. As long as a controversy exists, and here admittedly it does, the court must make a determination with respect to it. Furthermore, the trial court's conclusion that the remaining controversy is insubstantial is not warranted. The controversy with respect to Webb's liability for punitive damages is itself a substantial controversy. Everyone agrees that there was a substantial controversy between the Board and the Association when they were not agreed as to whether Webb should account for the $1,800,000 received from Lytton. That is a substantial sum of money and hence a potentially valuable asset of the Association. The claim for punitive damages is no different. If the Association has a valid claim for punitive damages, that is also a valuable asset which should be recovered for the benefit of the Association.

With respect to the Association's argument that there is original jurisdiction of the Association's claim

against Webb under 12 U.S.C.A. 1464(d)(1), Webb argues, in essence, that the statute should not be so construed because it does not specifically provide for suits against individuals, and otherwise refers to the Board and associations as adversaries. This begs the question. The statute does not specifically say who the Board or the associations may sue. It says only that the Board or the associations may sue with respect to the alleged violation of law raised by the Board's notice of violation. The statute obviously contemplates that someone will be sued. There are two possible constructions: (a) that the associations and the Board can only sue each other and then only when they disagree as to whether the Board is correct in claiming a violation of law; or (b) that either of them can sue the real party in interest who is claimed to be in violation of law. In a situation such as this where the officers of the association are the ones claimed to have violated the law, the first interpretation is almost meaningless, and could even defeat the object of the legislation. Certainly, the ultimate purpose is to correct the violation if there is one. If the statute means only that the Board and the associations can sue each other to determine what position the association should take, the result could well be that by the time the federal court determines that the Board is correct and that the association should sue its officers in the state court, it will too late to do so because the statute of limitations will have run. The more sensible construction is to say that the Board or the association can sue the alleged violator in the first instance. This gets at the heart of the matter and avoids the circuitous and idle procedure of merely determining whether the association should agree with the Board.

5. Reply to Argument IV. (Webb Brief, pp. 18-22).

The last argument made in the Webb brief is a reply to the Association's argument that the court has jurisdictiton of the Board's claim against Webb under 28 U.S.C.A. 1345, and ancillary jurisdiction of the Association's essentially identical claim as a cross-claim.

First, there is the question of whether the district courts have general jurisdiction of claims asserted by the Federal Home Loan Bank Board as an agency of the United States under 28 U.S.C.A. 1345. Webb argues (Webb Brief, pp. 19 and 20) that the Board cannot sue individuals under 12 U.S.C.A. 1464(d)(1). That is a separate point which is argued above, and is not relevant to the question of whether there is jurisdiction under 28 U.S.C.A. 1345. *Acron Investments, Inc. v. Federal Savings and Loan Insurance Corporation* (9th Cir. 1966) 263 F. 2d 236, holds that 28 U.S.C.A. 1345 confers federal jurisdiction on all suits brought by the Federal Savings and Loan Insurance Corporation. As shown in the Association's opening brief, the Federal Home Loan Bank Board is no different from the Federal Savings and Loan Insurance Corporation insofar as being an agency of the United States is concerned. Webb attempts to distinguish the *Acron* case on the theory that it does not hold that the Federal Savings and Loan Insurance Corporation's assignor could have brought suit in the federal court. We do not rely on the *Acron* case for that proposition. It holds only that the Federal Savings and Loan Insurance Corporation can bring suit in the federal court. We rely on the *Acron* case as establishing the principal that all corporate agencies of the United States, such as the Federal Home Loan Bank Board, can sue under 28 U.S.C.A. 1345.

Next, there is a question of whether 28 U.S.C.A. 1345 applies only to complaints or whether it applies to claims asserted in other pleadings. Webb argues (Webb Brief, p. 22) that the Association's position, that it applies to all claims, finds no support in any case and is contrary to the language of 28 U.S.C.A. 1345. We submit that the Association's position is supported by *Piochc Mines Consolidated Inc. v. Fidelity Philadelphia Trust Company* (9th Cir. 1953) 206 F. 2d 336. That case applies 28 U.S.C.A. 1332 to a counter claim. 28 U.S.C.A 1332 refers to "civil actions". 28 U.S.C.A. 1345 is even broader. It uses the words "civil actions, suits or proceedings."

Finally, the question is whether there can be ancillary jurisdiction of the Association's second amended and supplemental complaint derived from jurisdiction over the claims asserted by the Board in its answer and cross-claims. Webb has cited three cases (*Ferreria v. Sawayama etc.* (D.C.S.D. N.Y. 1959) 171 F. Supp. 96; *Burlingham etc. v. Luckenbach S.S Co.* (D.C.S.D. N.Y. 1962) 208 F. Supp. 544; *Mazzella v. Pan Occania etc.* (D.C.S.D. N.Y. 1964) 232 F. Supp. 29), which hold that when there is no diversity of citizenship between the plaintiff and the defendant, jurisdiction is not established when the defendant files a third party claim wherein there is diversity between the defendant and the third party defendant. In that sort of situation the third party claim could not be filed in the first instance to establish jurisdiction. A third party claim can only be asserted by a defendant against a third party for indemnity for all or some of the relief sought by the plaintiff. By the nature of it, a third party claim is always ancillary to the main suit. The case

now under consideration is not similar. The Board's assertion of its claims is not dependent on the Board being sued first by the Association. If the Association had not sued first, the Board could have filed a complaint against the Association and the Webb defendants. The court would have jurisdiction under either 28 U.S.C.A. 1345 or 12 U.S.C.A. 1464(d)(1). In fact, it has been specifically held in this case by this Court that the Board has the power to assert the very claim now under consideration against the Webb defendants. (*Reich v. Webb* (9th Cir. 1964) 336 F. 2d 153.) If the pleadings had originated in that form, with the Board suing first and asserting its claim in a complaint, the Association could have asserted its claim against the Webbs by cross-claim. Since the Association's claim is transaction-related, there would be ancillary jurisdiction. (*Scott v. Fancher* (5th Cir. 1966) 369 F. 2d 842, 844.)

The pleadings did not take that form because the Association sued first, and so instead of filing a complaint the Board asserted its claim against the Association by answer and against the Webbs by cross-claim. In either case the substance of the situation is the same. It differs only in the form of the pleadings filed. The form of the pleadings was dictated solely by the fortuitous circumstance that when the litigation started the Webb group controlled the Association and caused the Association to file first.

Summary of Reply to Webb Brief.

There are four bases of jurisdiction as between the Association and the Webb group.

1. Original jurisdiction of the Association's claim against Webb under 12 U.S.C.A. 1464(d)(1), because the statute authorizes suit by either the Board or an association against the persons claimed to be in violation of law by the Board's statutory notice.

2. Original jurisdiction of the Association's claim against Webb under either 28 U.S.C.A. 1331 (federal question), or 28 U.S.C.A. 1337 (regulation of commerce).

3. Original jurisdiction of the remaining controversy between the Board and the Association under 12 U.S.C.A. 1464(d)(1), and ancillary jurisdiction of the Association's claim against Webb.

4. Original jurisdiction of the Board's claim against Webb and the Association under either 28 U.S.C.A. 1345 or 12 U.S.C.A. 1464(d)(1), and ancillary jurisdiction of the Association's claim against Webb as a cross-claim.

Reply to Brief Filed by Title Insurance and Trust Company.

Title Insurance and Trust Company, is, together with Eugene and Marguerite Webb, a co-trustee of the trust created by the Webbs to hold the stock of the Southland Company. Title Insurance and Trust Company was added as a party defendant by the second amended

and supplemental complaint for the purpose of facilitating the enforcement of any orders made by the court with respect to the shares of stock held in trust.

The position of the Title Insurance and Trust Company is essentially that there is no jurisdiction over it because no claim has been asserted against it by the Federal Home Loan Bank Board. Title Insurance and Trust Company was not named in the Board's notice of violation of law so as to confer jurisdiction under 12 U.S.C.A. 1464 (Title Insurance and Trust Company Brief, Argument I, pp. 6-7); and the Board's pleadings assert no claim against it so as to found jurisdiction on 28 U.S.C.A. 1345 (Title Insurance and Trust Company Brief, Argument II, p. 7).

Our position is that Title Insurance and Trust Company is a proper party as an incident to, or ancillary to, the Association's claim against Webb. It is true that this depends upon the validity of the claim against Webb, but if that claim is properly before the court, it follows that Title Insurance and Trust Company can also be joined as a proper, though formal, party so that the court can make a complete determination of the controversy between the real parties in interest.

We submit that this procedure of joining Title Insurance and Trust Company as a formal party defendant is authorized under Rule 19 of the Federal Rules of Civil Procedure which provides for joinder of parties having an interest in the litigation but who are not indispensable. Such parties are sometimes referred to

"formal" or "proper" parties. See, for example, *Baltimore and O.R. Company v. Chicago River and Indiana R. Company,* (7th Cir. 1948) 170 F. 2d 654, where the court said at page 658:

> "Formal parties, or proper parties, are those who have no interest in the controversy between the immediate litigants but have an interest in the subject matter, which may be conveniently settled in the suit and thereby prevent further litigation; they may be made parties or not, at the option of the plaintiff."

Respectfully submitted,

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